

FEDERAL CIRCUIT COURT OF AUSTRALIA

XU v MINISTER FOR IMMIGRATION & ANOR

[2019] FCCA 110

Catchwords:

MIGRATION – Application for review of the decision by the Administrative Appeals Tribunal – whether the Tribunal failed to afford the applicant procedural fairness – allegation of an apprehension of bias against the Tribunal – no jurisdictional error found – application dismissed.

Legislation:

Migration Act 1958 (Cth), ss.101, 104, 107, 109, 359A, 476

Migration Regulations 1994 (Cth), reg.2.41

Cases cited:

Minister for Immigration and Citizenship v Chamnam You [2008] FCA 241

SZBYR v Minister for Immigration and Citizenship [2007] HCA 26; (2007) 81 ALJR 1190; (2007) 235 ALR 609; (2007) 96 ALD 1

Minister for Immigration and Multicultural Affairs v Jia [2001] HCA 17; (2001) 205 CLR 507; (2001) 75 ALJR 679; (2001) 178 ALR 421; (2001) 65 ALD 1

Applicant:

SHAORYING XU

First Respondent:

MINISTER FOR IMMIGRATION &
BORDER PROTECTION

Second Respondent:

ADMINISTRATIVE APPEALS
TRIBUNAL

File Number:

SYG 2757 of 2016

Judgment of:

Judge Nicholls

Hearing date:

29 November 2018

Date of Last Submission:

29 November 2018

Delivered at:

Sydney

Delivered on:

21 January 2019

REPRESENTATION

Applicant: In person

Counsel for the First Respondent: Mr T Liu

Solicitors for the Respondent: Australian Government Solicitor

ORDERS

- (1) The application made on 10 October 2016 is dismissed.
- (2) The applicant pay the first respondent's costs set in the amount of \$6000.
- (3)
- (4)
- (5)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT SYDNEY

SYG 2757 of 2016

SHAOYING XU

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

1. This is an application made on 10 October 2016 pursuant to s.476 of the *Migration Act 1958* (Cth) (“the Act”), seeking review of the decision of the Administrative Appeals Tribunal (“the Tribunal”), made on 5 September 2016 which affirmed the decision of the Minister’s delegate to cancel Ms Xu’s (“the applicant”) Five Year Resident Return Visa.
2. The evidence before the Court is contained in a bundle of relevant documents filed, and tendered, by the Minister (“the Court Book” – “CB”, “RE1”). I also note the applicant’s affidavit of 28 February 2017, and the applicant’s affidavit filed on 4 October 2018.

Background

3. The background to this case is as follows. The applicant is a citizen of the People's Republic of China ("China"). She was granted a subclass 820 Temporary Visa in December 2007. She arrived in Australia in 2008. On 17 November 2009 the applicant was granted a subclass 801 Permanent Visa. Subsequently, on 23 April 2015, the applicant was granted a Resident Return visa. In her applications for these visas the applicant stated that she had one child, a son, born in 2000.
4. The subclass 820 and 801 visas are visas granted to those who are found to be in a genuine spousal relationship with an Australian citizen, or resident. The applicant was granted these visas on the basis of her relationship with the visa sponsor, Mr Dong Cai Chen.
5. The matter currently before the Court concerns the Tribunal's decision to affirm the delegate's decision to cancel the applicant's Five Year Resident Return Visa. A visa which had been previously granted to the applicant on the basis of her having held an 801 (permanent) visa.
6. On the evidence before the Court the basis for the cancellation of the applicant's visa was as follows. One, that Mr Chen, her visa sponsor, and former spouse, provided information to the Minister's department about his relationship with a "new" wife. He told the Minister's department that he had been in a relationship with this woman since at least 25 July 2009. He provided evidence of that claim. Two, on 30 June 2010 the applicant made an application for a child visa for her daughter said to have been born in 1994 (in respect of whom she had made no reference in any of the earlier applications for visas).
7. On 11 March 2016, the delegate sent the applicant a notice pursuant to s.107 of the Act notifying her of an intention to consider cancellation of her resident return visa pursuant to s.109 of the act (CB 1 – CB 13). This notice indicated that the delegate had information that the applicant had not complied with s.101(a), s.101(b) and s.104 of the Act because of the following.

8. One, that the applicant had previously provided information in relation to her application for the 801 visa to the effect that she and Mr Chen were at that time in a genuine ongoing relationship (noting that that visa had been granted in November 2009). This appeared to be inconsistent with information provided later by Mr Chen which indicated that he had been in a relationship with another woman since at least 25 July 2009.
9. Two, the applicant, when asked, had failed to provide details of her daughter said to have been born in 1994 in her previous applications for spouse visas.
10. Three, the applicant failed to inform an officer of the Minister's department as required, in writing, of a change in circumstances prior to being granted the 801 visa.
11. Four, the applicant failed to tell the Minister's department, as she was obliged to do, that she was no longer in a genuine spouse relationship with Mr Chen since at least 25 July 2009.
12. The applicant's migration agent provided a response to this notice on 30 March 2016 (CB 22 – CB 23). The agent also provided a Statutory Declaration from the applicant (CB 24 – CB 31). The applicant explained that she had divorced Mr Chen "in name only" in January 2010. This was said to have been done to avoid pursuit by debt collectors to whom Mr Chen owed money. She also claimed that she discovered in April 2010 that Mr Chen had fathered a child with another woman but she said this followed a "one-night stand with that woman" (CB 28). The applicant also claimed that her daughter was taken away from her at birth in 1994 and that they had only been reunited in January 2009.
13. The delegate sent the applicant a second Notice of Intention to Consider Cancellation on 12 April 2016. In particular the second notice relied on the same claimed instances of non-compliance as set out in the first notice, but addressed a number of what are said to be "formatting errors", and an error in the identification of the applicant's previous visa (CB 58 – CB 63).

14. The applicant's Resident Return Visa was cancelled on 22 April 2016 pursuant to s.109(1) of the Act. In essence the delegate found that the elements in favour of cancellation outweighed the reasons not to cancel the applicant's resident return visa (CB 82).

The Tribunal's Decision

15. The applicant applied to the Tribunal for review on 27 April 2016 (CB 83). The applicant subsequently provided further submissions to the Tribunal. The applicant, accompanied by her representative, attended a hearing before the Tribunal on 2 August 2016.

16. In its decision record, the Tribunal set out the relevant background at [2] – [7] (CB 170 – CB 171). It identified the key issue in the review as being:

“8. The issue in the present case is whether that ground for cancellation is made out, and if so, whether the visa should be cancelled.” (CB 171).

17. The Tribunal found that the delegates notice provided pursuant to s.107 complied with all relevant statutory requirements ([14] – [17] at CB 171 to CB 172).

18. The Tribunal then addressed the question of whether there had been non-compliance as described in the s.107 notice (at CB 172):

“18. The next issue for the Tribunal to consider is whether there was non-compliance in the way described in the s.107 notice, being the manner particularised in the notice, and if so, whether the visa should be cancelled. The non-compliance identified and particularised in the s.107 notice was non-compliance with s.101(a) and s.104. The Tribunal will first consider the possible non-compliance with s.104.”

19. The Tribunal then set out its consideration of the evidence, and submissions, against each of the alleged instances of non-compliance (with reference to s.104, and s.101 of the Act). The Minister's written submissions provide a fair and accurate summary of the Tribunal's analysis and findings [13]:

“(a) On this issue of non-compliance with s 104, the Tribunal was not satisfied that the applicant believed that she was in a genuine

and continuing relationship with Mr Chen before she was granted her 801 visa in November 2009. The Tribunal at [35] of its reasons noted the applicant's lack of knowledge about Mr Chen and his previous relationship, his age and his daughters' ages. The Tribunal at [36] of its reasons also expressed its concern that Mr Chen returned to China just 10 days after the applicant arrived in Australia as the holder of a visa granted on the basis of their relationship. The Tribunal also did not accept that the applicant was unaware that Mr Chen entered into a subsequent relationship and found that she and Mr Chen divorced in January 2010 because he had formed another relationship and that the applicant and Mr Chen were no longer in a genuine spousal relationship: at [38]. The Tribunal found at [40] of its reasons that "at least since July 2009 [the applicant and Mr Chen] were purporting to be in a genuine relationship for the purpose of achieving a favourable migration outcome for the applicant, that is, a permanent visa." On that basis, the Tribunal found that the applicant failed to notify the Department of a change in her circumstances as required by s 104, and in the way described in the s 107 notice: at [40]-[41].

(b) On the issue of non-compliance with s 101(a) of the Act, the Tribunal at [44]-[45] of its reasons considered the applicant's response to the first notice and her oral evidence before the Tribunal. The Tribunal at [46] expressed concern about the reliability of the applicant's evidence and found that "the applicant has manufactured the evidence about her daughter being kidnapped" and "that the applicant did not correctly answer the question 'Your children' and therefore did not comply with s 101(a)."

20. Given these findings the Tribunal then turned to consider the question of whether the applicant's Resident Return Visa should be cancelled in the exercise of its discretion pursuant to s.109(1) of the Act. In this regard the Tribunal noted that it was required to consider the applicant's response to the s.107 notice and any prescribed circumstances. In this light regulation 2.41 of the *Migration Regulations 1994* (Cth) ("the Regulations") prescribes a number of circumstances for the purposes of s.109(1)(c) of the Act. (See [49] at CB 178):

"In exercising this power, the Tribunal must consider the applicant's response (if any) to the s.107 notice about the non-compliance, and have regard to any prescribed circumstances: s.109(1)(b) and (c). The prescribed circumstances are set out in r.2.41 of the Regulations. Briefly, they are:

- *the correct information*
- *the content of the genuine document (if any)*
- *whether the decision to grant a visa or immigration clear the visa holder was based, wholly or partly, on incorrect information or a bogus document*
- *the circumstances in which the non-compliance occurred*
- *the present circumstances of the visa holder*
- *the subsequent behaviour of the visa holder concerning his or her obligations under Subdivision C of Division 3 of Part 2 of the Act*
- *any other instances of non-compliance by the visa holder known to the Minister*
- *the time that has elapsed since the non-compliance*
- *any breaches of the law since the non-compliance and the seriousness of those breaches*
- *any contribution made by the holder to the community.”*

21. What follows in the Tribunal’s decision record is its consideration in relation to the exercise of its discretion. The Tribunal considered that the applicant and Mr Chen were, by July 2009, purporting to be in a genuine spousal relationship such as to obtain a favourable migration outcome for her. It also considered the applicant’s ties to Australia and the impact of cancellation on the applicant’s children. The Tribunal concluded at [70] (CB 182) as follows:

“[70] The Tribunal has considered as a primary consideration the best interests of the applicant's son, aged 16. While the applicant has spent some time separated from him, while he lived in China until 4½ years ago, and while she has been offshore on a number of occasions since he migrated to Australia, the Tribunal accepts it is in his best interests to be with his mother. It accepts there may be some hardship for the son if the visa is cancelled and it acknowledges it is still possible that his visa may also be cancelled. However it is satisfied the son will adjust to life in China where he lived and went to school until he was about 12 years old. The Tribunal does not accept the applicant's evidence that he will not be able to pursue further study in China. The Tribunal finds it is in his best interests to have the option of living with his mother and it is satisfied that he will be able to adjust to life in China with the support of his mother. The applicant's daughter is an adult and the Tribunal notes she is living independently away from her mother. The Tribunal is satisfied that if her visa is cancelled she will adjust to life in China given that she has spent most of her life there, up until December 2011.”

The Application to the Court

22. The sole ground of the application to the Court is in the following terms:

“1. The Administrative Appeals Tribunal failed to provide the applicant procedural fairness by referring to material in an application made by her former husband sponsoring his current wife without providing the applicant to comment on the information or to provide material refuting the information.”

23. [Error in original]

Before the Court

24. At the hearing the applicant appeared in person. She was assisted by an interpreter in the Mandarin language. The Minister was represented by counsel. The Minister objected to the applicant’s affidavit of 28 February 2017 being admitted into evidence. The contents of that document set out the applicant’s background. In essence, what is in the affidavit is a repetition of the applicant’s claims as set out in her response to the cancellation notice and what she ultimately put to the Tribunal. For the most part the applicant’s oral submissions before the Court followed the matters set out in this document. I treated this document as written submissions by the applicant and refused to admit it into evidence.
25. The applicant’s affidavit filed on 4 October 2018 (dated 2 October 2018) consisted of a copy of the applicant’s marriage certificate, a birth certificate and a copy of her son’s passport. All of these documents post-dated the date of the Tribunal decision. The affidavit, and the annexures, were not read into evidence.
26. The applicant’s submissions before the Court (and drawing also from her “written submissions”) were as follows.
27. One, the decision to cancel her visa was a “sudden” decision. She had returned from China and found her visa had been cancelled. She was therefore unable to go back to China to obtain “the evidence” (this was apparently a reference to some unidentified documentation). The applicant did not explain what this documentation could be.

28. I do not accept the applicant's description of the delegate's decision as being a "sudden" decision given that the delegate complied with relevant notice requirements to the applicant. A notice to which she responded. In any event, this does not explain, or address, any matter of jurisdictional error in the Tribunal's decision.
29. Two, the applicant gave an account of what she said had occurred in relation to her former husband, and the "other woman". She stated "I was simply the one who was kept in the dark" about this other relationship, and he had "discarded" her. In short, she sought to portray herself as the innocent injured party and that her former husband was the one who had "cheated" her. The complaint was that the department accepted what he said. I considered this complaint with reference to the Tribunal's decision.
30. In all, given the Tribunals detailed report on what occurred at the hearing with the applicant, and its comprehensive assessment of the relevant issues, the applicant's complaint in this regard does not rise above a request for impermissible merits review. It does not indicate, let alone reveal jurisdictional error in the Tribunal's decision. I note that despite opportunity to do so, the applicant has not provided a transcript of the hearing before the Tribunal. On this basis there is no other evidence to challenge the Tribunal's account in its decision record of what was said at the Tribunal hearing.
31. Three, the applicant also made a number of complaints about what she said had been done by the Minister's department. She described this conduct as the "many unfairness". In particular, her complaint was that the Department initially accepted her evidence, but then "rejected" it. Again nothing in this part of the applicant's submissions directed attention to any jurisdictional error in the Tribunal's decision.
32. Other matters raised by the applicant's submissions are addressed below.
33. The applicant's ground in her application, and the applicant's complaints as expressed in her submissions, appeared to raise three complaints about the Tribunal's decision and conduct.

34. First, the applicant appears to complain that the Tribunal denied her procedural fairness because it relied on certain information without giving her the opportunity to comment on it, or provide evidence to refute it. This information is identified, generally, as being information in an application made by her former husband in sponsoring his current wife in her application for a visa.
35. The relevant procedural fairness obligation in relation to information which the Tribunal considers to be the reason, or a part of the reason, for affirming the delegate's decision is contained in s.359A(1) of the Act.
36. The difficulty for the applicant is that the obligation in s.359A(1) is not enlivened in circumstances where s.359A(4) is engaged.
37. In the current case the Tribunal did refer to information concerning the applicant's former husband, and his relationship with his current spouse. However, in the circumstances before the Court, s.359A(4) is engaged, and thereby excludes such information from the operation of s.359A(1).
38. In his decision record the delegate did refer to information retained by the Minister's department that indicated that the applicant's former husband, Mr Chen (see [11] at CB 74):
- "... has been living in a committed relationship with another person since 25 July 2009. The information from the sponsor is evidence that he was not only living with another person, but also in a committed relationship which included having a child on 11 July 2009."*
39. The delegate also stated in his decision record that Mr Chen:
- "... advised the department that he committed to a long-term relationship with the other woman on 25 July 2009, having had a child with her on 11 July 2009. He also advised the department that he had been in a relationship with that woman since November 2007, having first met her in August 2007."* ([18] at CB 76).
40. The Tribunal, variously, did refer to this information in its decision record. (See [2], [19], [28] and [30], CB 170, CB 172, CB 174 and CB 175). Further, it did not accept the applicant's evidence and

submissions as to her version of relevant events. The Tribunal found, based in part on the information that it “... formed the view that the parties divorced in January 2010 because the sponsor had formed another relationship and the applicant and the sponsor were not in a genuine spouse relationship” ([38] at CB 176). This was an important element in the Tribunal’s conclusion that the applicant had not complied with s.104 of the Act ([41] at CB 177).

41. However, the evidence before the Court reveals that the Tribunal derived this information from what was recorded in the delegate’s decision. There is nothing to indicate that the Tribunal derived it from any other source.

42. The relevant references (see *Minister for Immigration and Citizenship v Chamnam You* [2008] FCA 241 at [16]) to this information in the Tribunal’s decision reveals that its provenance is clearly the delegate’s decision. At [15] – [17] (CB 171 to CB 172) of the decision record, (which includes the source of the information referred to above) the Tribunal made specific reference to what had been set out in the delegate’s decision in this regard.

43. The evidence before the Court is that the applicant gave a copy of the delegate’s decision to the Tribunal at the time of making her application for review (see CB 84).

44. Further, in its decision record the Tribunal stated:

“*The applicant has provided to the Tribunal a copy of the delegate’s decision record.*” ([2] at CB 170).

45. There is no claim, let alone evidence, from the applicant now that that was not the case.

46. In light of this evidence the provisions of s.359A(4)(b) exempt this information from the operation of s.359A(1).

47. Nor, as the Minister submits, is there anything in the Tribunal’s decision record to indicate that there was information, beyond what was in the delegate’s decision, which engaged s.359A(1): (*SZBYR v Minister for Immigration and Citizenship* [2007] HCA 26; (2007) 81 ALJR 1190 at [17]-[18]).

48. Even if the principles of procedural fairness at common law were to apply, the evidence does not support the applicant's complaint that she was not given the opportunity to comment on this information, or to respond to it, by bringing other evidence.
49. One, the applicant plainly had, at best as at the time of the making of her application to the Tribunal, a copy of the delegate's reasons. She would have been on notice, at that time, of the information adverse to her which was relied on by the delegate, and subsequently the Tribunal.
50. Two, the applicant has not provided a transcript of the Tribunal hearing. On the only evidence before the Court, the Tribunal's account of the hearing as set out in its decision record, the Tribunal discussed this information and the possible non-compliance with s.104 with the applicant. The applicant gave her evidence in response (see [19] – [32] at CB 172 to CB 175).
51. The fact that the Tribunal was not persuaded by her evidence, and preferred the information in the delegate's decision, does not reveal a denial of procedural fairness.
52. The second complaint, or element, arising from the applicant's ground, and submissions, is her disagreement with the Tribunal's factual findings about her relationship with Mr Chen.
53. As the Minister submits the applicant's assertions here, really invite the Court to engage in impermissible merits review. The Tribunal's findings were reasonably open to it on what was before it. Its reasoning reveals an engagement with the evidence and information before it, and an intelligible justification for its conclusions, which were probative of the information and evidence before it.
54. The third element, or complaint, appears to be an allegation of bias. The applicant asserted in her affidavit, and before the Court, that the Tribunal member: "... was holding prejudice against me". This was said to be because the Tribunal "... asked questions that were not related to the situation, which was not respecting the fact and completely imaginary and did not conform to the reality." This

complaint does not reveal jurisdictional error in the Tribunal's decision.

55. One, it is the case that an allegation of bias is a serious allegation to make. For this reason it must be distinctly made and clearly proven: *Minister for Immigration and Multicultural Affairs v Jia* [2001] HCA 17; (2001) 205 CLR 507 at [69]. In the circumstances the complaint is no more than an expression of grievance with the Tribunal's decision.
56. Two, there is nothing in the evidence before the Court to indicate that the Tribunal took into account an irrelevant consideration. On the evidence the Tribunal's questions were relevant to, and arose from, the relevant statutory scheme, and the circumstances presented.
57. Three, before the Court the applicant submitted that the Tribunal's bias was revealed because it relied on the information from her former husband who was "obviously lying". Further, that the Tribunal revealed bias because her marital and personal circumstances only "changed" after her divorce. She did not know of her husband's infidelity. In that circumstance therefore she could not report the breakdown of her relationship to the Minister's department.
58. The applicant made this identical claim before the Tribunal. The Tribunal specifically considered it. (See [33] – [35] at CB 175-176). The Tribunal reports that it questioned the applicant about this claim at the hearing. In particular, it found that she "struggled" to provide relevant and "basic" information in response.
59. In the circumstances presented, and on the evidence before the Court, the applicant's apparent allegation of bias is no more than an expression of grievance because the Tribunal did not accept her "version" of relevant events. This complaint is not made out.

Conclusion

60. In all there is no jurisdictional error apparent in the Tribunal's decision. Contrary to her assertions now the applicant was given a fair opportunity at the hearing before the Tribunal to address the issues in the review, and was in any event on notice of the critical

factor relating to the information and statements made by her former husband.

61. The Tribunal's decision, and the findings which informed its conclusion, were all reasonably open to it on what was before it. In the circumstances, the applicant's complaint before the Court did not rise above an expression of grievance with the outcome of the Tribunal's consideration.
62. It is appropriate to dismiss the application to the Court. I will make the appropriate order.

I certify that the preceding sixty (60) paragraphs are a true copy of the reasons for judgment of Judge Nicholls

Date: 21 January 2019